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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 04 049 50679 Office: NEBRASKA SERVICE CENTER Date: JUN 03 2004

IN RE: Petitioner: [redacted]
Beneficiaries:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION**: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a human resource solution enterprise. It desires to employ the beneficiaries as laborers for 11 months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that it applied for or received certification or a notice that certification could not be made for the dates specified on the petition.

On appeal, the petitioner states that the information he submitted showed that qualified workers in the United States were not available, and that he complied with the regulatory requirements.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

The test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is seasonal and a one-time occurrence.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Individuals will be engaged in building construction-site labor as directed, i.e., picking-up debris on site grounds, shoveling and raking dirt, gravel or other materials and assisting other skilled laborers/operators.

The Petition for a Nonimmigrant Worker (Form I-129) was properly filed on December 9, 2003. The ETA 750, which accompanied the petition, indicates that the petitioner has 75 openings for laborers to be filled from June 1, 2003 until December 1, 2003. The DOL determined that a certification could not be made because the employer had not established a temporary need.

In a letter, dated November 30, 2003, the petitioner stated that he established a definitive need for alien workers to the DOL, and since the period that the certification was to be valid through had elapsed, he requested that the certification be valid from January 5, 2004 to November 30, 2004.

The regulation requires that, prior to filing a petition with the director to classify an alien as an H-2B worker, the petitioner must apply for a temporary labor certificate with the Secretary of Labor for all areas in the United States, except the Territory of Guam. 8 C.F.R. § 214.2(h)(6)(iii)(A). In this case, the petition must be accompanied by a current or new DOL determination. The petitioner's request to amend the dates of intended employment listed on the ETA 750 must be done by the DOL prior to filing the petition. Neither the statute nor the regulations allows for a change in the terms and conditions of employment during this proceeding.

This petition may not be approved for an additional reason. In a letter, dated November 30, 2003, the petitioner stated that he operates as a human resource consultant and currently has no support staff or other employees. He explains that he desires to hire seasonal workers to work as general laborers. He states that he began his recruitment efforts in January hoping to have acquired a base of applicants and potential hires by early March, the beginning of the construction season. The petitioner proposes to hire and maintain a substantial workforce to be utilized the entire construction season.

In this instance, it is the petitioner's business to supply workers. In acting as an employment contractor, the petitioner has a permanent need to have workers available to perform labor or services on a continuing basis. While an individual contract might be temporary in nature, the petitioner will always have a need for workers to fulfill its contracts. In his letter, dated May 1, 2003, the petitioner states in pertinent part that:

> Recruitment and staffing have been an issue that my operation has been addressing on an ongoing basis. . .We have not been able to acquire nor maintain a reliable seasonal workforce.

If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas. Consequently, the petitioner has not established that its need for the beneficiary's services is seasonal, or a one-time occurrence and temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.